IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 22, 2005

IN THE MATTER OF: THE ESTATE OF ROOSEVELT DUKES, DECEASED

Appeal from the Chancery Court for Lincoln County
No. P-1994 J. B. Cox, Judge

No. M2004-00340-COA-R3-CV - Filed February 27, 2006

The matters at issue pertain to claims made against a decedent's estate. Nell Shubert timely filed four claims against the Estate of Roosevelt Dukes for: (1) the balance owing on two promissory notes, (2) property taxes paid on behalf of the decedent, (3) rent on real property, and (4) the purchase of a bush hog. The executrix filed exceptions to all claims. After the time passed for filing claims, Ms. Shubert amended her claim on the promissory notes to add a request for attorney fees. The trial court ruled in favor of Ms. Shubert on the promissory notes including the claim for attorney fees but denied all other claims. We affirm with one exception, finding Ms. Shubert is entitled to recover property taxes paid on behalf of Mr. Dukes to preserve the property.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Reversed in Part

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Johnny D. Hill, Jr., Fayetteville, Tennessee, for the appellant, Rosemary Sebastian, Executor of the Estate of Roosevelt Dukes.

James S. Hereford, Jr., Fayetteville, Tennessee, for the appellee, Nell M. Shubert.

OPINION

Nell Shubert and her husband Fred Shubert[1] were long-time neighbors and friends of Roosevelt Dukes during which time they engaged in a variety of business transactions. When Mr. Dukes died Ms. Shubert filed claims against his estate.

The more substantial of the four claims at issue arose from a transaction that occurred in 1989 when the Shuberts agreed to sell to Mr. Dukes a 40-acre tract of land. All but one of the

[1] Fred Shubert died in 1995 following which all rights to the claims passed to Ms. Shubert.

documents pertaining to that transaction were prepared by the Shuberts' attorney. The closing took place at the office of the Shuberts' attorney where the parties executed the deed, deed of trust and one promissory note the Shuberts' attorney had prepared. The deed indicated the consideration for the transaction was $18,500 and the promissory note evidenced a debt in the amount of $18,500. On the day following the closing, Mr. Dukes signed another promissory note in the same amount, $18,500 (hereinafter the "second note"). The second note was handwritten by Ms. Shubert. Mr. Dukes made annual payments on both notes for several years.

Ms. Shubert made three additional claims against the Estate. One was for the rental of real estate in the amount of $500, another was for the sale of a bush hog in the amount of $800, and the third was for property taxes she paid on the property sold to Mr. Dukes. She paid the 2002 property taxes in the amount of $501.07 upon learning Mr. Dukes had failed to pay the taxes and the property was to be sold at a tax sale.

Following Mr. Dukes' death his daughter, Rosemary Sebastian, petitioned the probate court to open his probate estate, filed the will with the court and was appointed executrix. Within the time to file claims of creditors, Ms. Shubert filed her claims in the aggregate amount of $35,111.00 for the debt remaining on the two promissory notes, rent due, balance owing on the bush hog and the real estate taxes she paid for Mr. Dukes' benefit. Ms. Sebastian filed an exception to all of the claims. On the day of the hearing on the claims, Ms. Shubert filed an amendment to her claims. She reduced the amount of the claim on the bush hog[2] and added a request to recover attorney's fees on her claim on the promissory notes.

After conducting an evidentiary hearing on all of the claims, the trial court approved Ms. Shubert's claim on both promissory notes, including an award for attorney fees; however, the claims for the bush hog, rent and property taxes were denied. Both parties appeal.

The Estate raises three issues on appeal. It contends the trial court erred by: (1) excluding the testimony of Joe Smith concerning his opinion of the value of the property sold to Mr. Dukes; (2) approving Ms. Shubert's claim on the two promissory notes; and (3) allowing Ms. Shubert to amend her claim after the deadline to file claims to assert a claim for attorney fees. Ms. Shubert appeals the denial of her claims for the bush hog, rent and property taxes paid on behalf of Mr. Dukes and she seeks to recover her attorney fees incurred on appeal.

STANDARD OF REVIEW

The standard of review of a trial court's findings of fact is *de novo* and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). For the evidence to preponderate against a trial court's finding of fact, it must support another

[2] Ms. Shubert testified that after filing the claim she found receipts for the payment of other pieces of equipment sold to Mr. Dukes and thus reduced the amount owed through an amendment to the claim.

finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Where the trial court does not make findings of fact, there is no presumption of correctness and we "must conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). We also give great weight to a trial court's determinations of credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). Issues of law are reviewed *de novo* with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

EXCLUSION OF EVIDENCE

The Estate contends the trial court erred by excluding the opinion testimony of Joe Smith, whose testimony was offered for the purpose of establishing the value of the forty acres the Shuberts sold to Mr. Dukes in 1989. We find no error with the trial court's decision to exclude the opinion offered by Mr. Smith.

The admissibility of evidence lies within the sound discretion of the trial court, and a decision to admit or exclude evidence will be overturned on appeal only upon a showing of abuse of discretion. *Mercer v. Vanderbilt University*, 134 S.W.3d 121, 130 (Tenn. 2004). "A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." *Id*. (citations omitted).

Mr. Smith is a respected real estate professional in Lincoln County, where he has worked for many years. The Estate called Mr. Smith as a witness and attempted to offer his opinion of the value of the property in 1989 to establish the property was worth $18,500 when sold to Mr. Dukes in 1989 as stated in the 1989 deed and the first promissory note, not $37,000. The reason for this was to establish that the Shuberts' attorney had not made a mistake by stating the consideration was $18,500.

The opinion to be offered by Mr. Smith was based in part on a chart he presented. The court however found the chart, and more significantly the so-called comparables Mr. Smith was relying on to offer his opinion were not properties of an approximately equivalent size or character to that sold to Mr. Dukes. The record establishes that the comparables relied on by Mr. Smith ranged from 11 acres to 199 acres. Moreover, and significantly, Mr. Smith acknowledged that the most accurate assessment of the value of the subject property in 1989 would require an appraisal, taking into consideration market conditions in 1989, which Smith had not done. Based on these facts, we find no error with the decision to exclude the opinion testimony of Mr. Smith concerning the value of the property.

THE PROMISSORY NOTES

The Estate challenges the trial court's decision to approve $27,347.58 of Ms. Shubert's claim on the two promissory notes, which is inclusive of the unpaid principal balance on the two notes, accrued interest thereon and attorney fees. We find no error with the trial court's decision to hold the Estate liable on both promissory notes or to allow Ms. Shubert to recover her attorney fees.

Roosevelt Dukes died on April 15, 2002 at the age of 73. At the time of his death one of his most significant assets was the 40 acres he acquired from the Shuberts on July 27, 1989. The closing documents for the sale of the real estate had been prepared by the Shuberts' attorney. The documents the Shuberts' attorney prepared for the closing were the warranty deed to the property, a promissory note in the principal amount of $18,500, and the deed of trust. The parties executed all of the documents prepared by the Shuberts' attorney, and the closing documents were properly recorded shortly after the closing.

On the day following the closing, the Shuberts presented a second promissory note, also in the amount of $18,500, for Mr. Dukes to sign. Mr. Dukes signed the second promissory note. The two promissory notes are similar but not identical, with two significant differences.[3] One difference is the notes were executed on different days. The first note was executed on July 27 and the second note was executed on July 28. The other significant difference is the first promissory note provided for annual payments of principal and interest in August of each year and the second note provided for annual payments of principal and interest in February of each year. The second promissory note Mr. Dukes executed, which is the one at the center of this controversy, reads in pertinent part:

> As hereinafter stated after date, I Roosevelt Duke (sic) promise to pay to the order of Fred or Nell Shubert of new Market, Alabama, at their home in New Market $18,500 for value received without defalcation with interest from August ___, 1989 at $2400.00 per year, at 11% Interest.
>
> I agree to pay this note as follows: on February 1, 1990 $2400 and on each February 1st thereafter until full amount is paid. Interest is to be paid first, balance to apply to principal.

The note additionally incorporates provisions for recovery in the event of nonpayment for more than thirty days and the right of the holder to declare the note due and payable, to place it in "the hands of an attorney for collection by suit," and to recover costs and expenses of collection including reasonable attorney's fees. The first promissory note had similar provisions including the right to recover costs of collection and reasonable attorney's fees.

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[3] There is a third obvious but legally insignificant difference, that the first promissory note was typed and the second note was handwritten by Ms. Shubert.

Following a full evidentiary hearing the trial court made its ruling as to the claim on the two promissory notes. The order reads:

> From the presentation of evidence in open court and the entire record in this cause, the Court finds that the claim, as amended, should be allowed to the extent of Twenty-Seven Thousand, Three Hundred, Forty-Seven and 58/100 ($27,347.58) Dollars as of February 4, 1003, [sic] plus accruing interest on the promissory notes portion of the amended claim and plus continuing attorney's fees for the collection of the promissory notes. The sum of Twenty-Seven Thousand, Three Hundred, Forty-Seven and 58/100 ($27,347.58) Dollars is composed of the unpaid principal balance and accrued interest thereon of the promissory note secured by deed of trust dated July 27, 1989, in the amount of Fourteen Thousand, Six Hundred, Thirty-One and 09/100 ($14,631.09) Dollars; the unpaid principal balance and accrued interest thereon of the unsecured promissory note dated July 28, 1989, in the amount of Ten Thousand, Two Hundred, Forty-One and 49/100 ($10,241.49) Dollars; and the attorney's fees incurred by claimant through February 3, 2003, in the amount of Two Thousand, Four Hundred, Seventy-Five and 00/100 ($2,475.00) Dollars. From all the facts and circumstances as shown to the Court, the Court is of the opinion that the Estate of Roosevelt Dukes, deceased, is estopped to claim any defenses, whether personal or real, to the portion of the claim evidenced by the promissory notes by virtue of conduct of the decedent until his death; and further, the Court is of the opinion that the decedent and the claimant's husband, Fred Shubert, reached an accord as to the unpaid principal balance on the promissory notes as borne out by the receipts dated March 3, 1994, and August 15, 1994, offered into evidence and which relate to the promissory note dated July 28, 1989, and the promissory note dated July 27, 1989, respectively. Additionally, the Court finds that attorney's fees and other costs of collection of the promissory notes heretofore or hereafter incurred by claimant are called for by the promissory notes.

The undisputed evidence established that Mr. Dukes paid the notes for more than nine years and that he would pay the first note on or about August and the second note on or about February, as the promissory notes required. Of even greater significance is the undisputed fact that Mr. Dukes was provided a receipt each time he made a payment, which set forth the amount of the payment and the balance owing on each respective note. The evidence is further undisputed that Mr. Dukes never complained about the amounts indicated on the receipts and never challenged his obligation on the first or second promissory note.[4]

[4]Mr. Dukes also purchased an unrelated tract from the Shuberts in April of 1995 for which he executed a promissory note in the amount of $37,500. He made payments on the note until he determined he could no longer afford the property. Upon advising the Shuberts of this fact, the Shuberts agreed to forgive that indebtedness in consideration of a deed in lieu of foreclosure to convey the property back to the Shuberts, which was executed following which the Shuberts recorded a full release of the indebtedness. Ms. Shubert did not make a claim for that indebtedness.

The Estate contends Ms. Shubert is estopped to assert a claim on the second promissory note because the affidavit contained in the July 27, 1989 deed stated the consideration of the sale was $18,500.[5] This fact is relevant, as the Estate contends, to the issue at hand but it alone does not bar the claim. It is but one of many facts to be considered to determine whether Mr. Dukes was only indebted on the first promissory note in the original amount of $18,500 or whether he was indebted on both notes for the aggregate of $37,000. The trial court made the finding that Mr. Dukes had paid on the two notes for several years, that he received receipts showing the balance owing on each note following each annual payment, and his conduct over the years evidenced his acknowledgment that he was indebted on both promissory notes. The evidence in the record does not preponderate against the trial court's finding.

ATTORNEY FEES

The Estate contends Ms. Shubert was not entitled to recover her attorney fees. The Estate contends the claim for attorney fees was filed after the deadline to assert a claim. It also contends Mr. Dukes was not in default and therefore the default provisions in the promissory notes upon which Ms. Shubert relies are inapplicable.

The Amended Claim

Ms. Shubert's initial claim on the two promissory notes, which was filed timely, sought to recover the unpaid balance on the notes along with accrued interest. She did not initially assert a claim to recover attorney fees for the cost of collection. On February 4, 2003, the day of the hearing on her claims, Ms. Shubert requested and obtained leave of court to amend her claim on the promissory notes to recover attorney fees incurred to collect on the notes. The amendment occurred after the deadline passed for creditors to file claims. The Estate contends the increase of the amount of the claim and the addition of a claim for attorney's fees constituted an impermissible addition because such was time barred.

In 2005 the General Assembly established time lines for amending claims against estates and imposed additional restrictions to amending claims after the deadline to file claims has passed with the enactment of Tenn. Code Ann. § 30-2-307(e).[6] That amendment, however, became effective April 22, 2005, after Ms. Shubert amended her claim. Therefore, Tenn. Code Ann. § 30-2-307(e)

[5] The Estate also contends the claim is barred by doctrine of merger, the doctrine of resulting trust, and the parol evidence rule. We find these inapplicable to the matters at issue and decline to discuss them in detail.

[6] "A creditor who has timely filed a claim against the estate shall file any amendment to its claim no later than thirty (30) days from the later of: (A) The date an exception to the claim is filed; or (B) The expiration of the exception period." Tenn. Code Ann. § 30-2-307(e)(1) (supp.2005) The 2005 amendment further provides: "Unless the court with jurisdiction over the probate of the decedent's estate grants an extension of time for amendment on the creditor's showing of extraordinary circumstances, any amendment filed after the time prescribed shall be void. Tenn. Code Ann. § 30-2-307(e)(2) (supp.2005)

is inapplicable to the matters at issue. Accordingly, we must examine the law in effect prior to the 2005 amendment.

The Estate relies on *Solomon v. Witt's Estate*, 311 S.W.2d 815 (Tenn. Ct. App. 1957) to argue it was error to increase her claim after the deadline had passed to file claims. We find this reliance on *Solomon* misplaced.[7] The *Solomon* court denied the amendment because Mr. Solomon's claim had already been reduced to judgment. *Id.* at 816. The claim had been reduced to judgment because the Witt estate did not file an exception to Mr. Solomon's claim within the statutory period for filing exceptions. *Id.* (holding that a judgment against an estate becomes final upon the expiration of the statutory period for filing exceptions thereto in the absence of an exception). In the case at bar, Ms. Shubert's claim had not been reduced to judgment when the court approved the amendment. This court previously distinguished *Solomon* based upon the "reduced to judgment" factor and permitted a creditor to increase the original claim after the time to file claims expired. *See Carr v. University of Tennessee Hosp*., No. 1363, 1991 WL 12839 (Tenn. Ct. App. Feb. 8, 1991). After distinguishing *Solomon* from *Carr*, we affirmed the probate court's decision authorizing the hospital to significantly increase the amount of its original claim after the deadline expired. *Id*. at * 2. Having distinguished *Solomo*n from the facts of this case, we therefore find it is not controlling.

Our courts have historically permitted a party to amend a claim after the filing deadline passed provided the amendment does not introduce a "new cause or a new party." *Cooper's Estate v. Keathley*, 177 S.W.2d 356, 359 (Tenn. 1943) (holding that an amendment which does not introduce a new cause or a new party relates back to the beginning of the suit). *Keathley* evidences a liberal policy for allowing amended claims against estates to relate back to the original timely filed claim. A "new cause of action" is generally found where a new set of facts are introduced out of which liability arises or new parties are introduced. *Whitson v. Tennessee Cent. Ry. Co.*, 40 S.W.2d 396, 397 (Tenn.1931); *see also Link v. Southeastern Greyhound Lines*, 279 S.W.2d 259, 265; *McClearly v. Morgan,* 449 S.W.2d 440, 446 (Tenn. Ct. App. 1968). Moreover, our courts have held that an attorney's fee provision in a promissory note is a constituent part of the obligation and is not considered a distinct obligation to be enforced in behalf of the attorney or as a separate cause of action. *Antrican v. Grand Exhaust Systems, Inc.*, 956 F.2d 268, 268 (6th Cir.1992); *Strong v. Efficiency Apartment Corporation*, 17 S. W. 2d 1, 3 (Tenn. 1929)*: Merrimon v. Parkey*, 191 S. W. 327, 329 (Tenn. 1917); *Fields v. Horn*, 191 S. W. 331, 331 (Tenn. 1917). Ms. Shubert's claim to recover her attorney's fees is an element of the damages associated with her claim, cause of action, on the promissory notes. Accordingly, the claim for attorney's fees associated with the notes was not time barred and, therefore, the trial court did not err by permitting Ms. Shubert to amend her claim on the promissory notes.

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[7] We are mindful Tennessee's respected treatise on administration of estates also states that a claim may not be increased after the statutory period for the filing of claims has expired. JACK W. ROBINSON, SR. & JEFF MOBLEY, PRITCHARD ON WILLS AND ADMINISTRATION OF ESTATES § 790 (5th ed. 1994). PRITCHARD however cites only *Solomon* as authority for that statement and we have distinguished *Solomon* from the facts of this case.

The Default Clause

The Estate contends Ms. Shubert is not entitled to recover attorney fees because the promissory notes only provide for the recovery of attorney fees in the event of a default, and it contends the notes were not in default.

The first promissory note provides, "If default is made in the payment of any installment of interest or principal, the holder may, at his option, declare the entire unpaid balance of this note due and in default." It further provides, "should default be made in the payment of this note, we agree to pay all costs of collection, including a reasonable attorney's fee, should same be placed in the hands of an attorney for collection after default."

The second promissory note contains similar provisions. "If any installment of interest or of principal of this note shall remain unpaid for more than thirty days after the same shall fall due and become payable or is default be made under any of the terms of provisions of this note, . . . the holder of this note shall have the right and option to declare the whole of this note due and payable. . . ." The second note further provides, "If this note be placed in the hands of an attorney for collection by suit or otherwise, we hereby agree to pay all costs and expenses of collection, including a reasonable attorney's fee."

Default is defined in Black's Law Dictionary as, "The omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due." BLACK'S LAW DICTIONARY 505 (Rev. 4th ed. 1968). Following Mr. Dukes' death, no payments were made on either note. Accordingly, the notes went into default as and when the respective due dates passed. Moreover, the Executrix's action of filing an exception to Ms. Shubert's claim on the two promissory notes challenged the validity of the notes. It was therefore appropriate for Ms. Shubert to place the notes "in the hands of an attorney for collection." The notes expressly provide that Ms. Shubert was entitled to recover all costs and expenses of collection, including a reasonable attorney's fee in the event she placed the notes in the hands of an attorney for collection.

We therefore affirm the trial court's award of attorney fees to Ms. Shubert as provided for in both promissory notes. Additionally, Ms. Shubert has requested and is entitled to recover her attorney's fees and costs incurred on appeal.

DISMISSAL OF CLAIMS AS TO THE BUSH HOG AND RENT

The trial court dismissed the claims concerning the bush hog and rent, the aggregate of these claims totaling $1,300, upon a finding there was a "failure of proof." In Ms. Shubert's brief it is contended there is evidence to support the claims; however, we are not provided with the benefit of knowing where that evidence is in the record as it is not identified as required by Tenn. R. App. P. 27(g). Due to the failure to comply with the Rule 27(g) we, therefore, deem the issues waived. *See Painter v. Toyo Kogyo of Japan*, 682 S.W.2d 944, 951 (Tenn. Ct. App. 1984) (citing *State v. Goodman*, 643 S.W.2d 375, 378 (Tenn. Crim. App. 1982); *State v. Hicks*, 629 S.W.2d 908, 910

(Tenn. Crim. App. 1981); and *State v. Doelman*, 620 S.W.2d 96, 99 (Tenn. Crim. App. 1981)). Nevertheless, having examined the record we find only scant evidence in support of these claims and find the evidence does not preponderate against the trial court's findings. We therefore affirm the decision to deny these two claims.

PROPERTY TAXES

Ms. Shubert contends the trial court erred by denying her claim of $501.07 for 2002 property taxes she paid on the property sold to Mr. Dukes. Ms. Shubert states she paid the property taxes after receiving notice the property was to be sold at auction for non-payment of property taxes. Without speaking to Mr. Dukes, Ms. Shubert paid the taxes to preserve the collateral and now seeks reimbursement. We have concluded she is entitled to recover on two grounds.

A mortgagee who, to protect his or her interest in mortgaged property, pays taxes, which the mortgagor is under a duty to pay, is entitled to be reimbursed for the amount paid. *Law v. Dewoskin*, 447 S.W.2d 361, 459 (Tenn. 1969) (citing, A.B. Shepherd, Annotation, *Right and Remedy of Mortgagee Who for the Protection of his Security Pays Taxes on, or Redeems from Tax Sale of, Mortgaged Property,* 84 A.L.R., 1366 (1939), E.B.M., Annotation, *Right and Remedy of the Mortgagee who for Protection of his Security Pays Taxes on, or Redeems from Tax Sale of, Mortgaged Property,* 123 A.L.R., 1248 (1938)); *see also,* 59 C.J.S. *Mortgages* § 308.

Additionally, the deed of trust signed by Mr. Dukes provides:

> I agree . . . to pay all taxes and assessments, and to pay them when due; and if I fail to do either, then . . . the creditor herein secured, may do either, and charge and treat the amount so expended as a part of the debt herein secured.

For the foregoing reasons, we find that Ms. Shubert is entitled to recover the 2002 property taxes she paid to preserve the property and therefore reverse the trial court on this one issue. Accordingly, we remand the matter to the trial court for entry of an additional judgment of $501.07.

CONCLUSION

This matter is remanded to the trial court for entry of a judgment consistent with this opinion and for such other proceedings as may be necessary. Costs of appeal are assessed against the Estate of Roosevelt Dukes.

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FRANK G. CLEMENT, JR., JUDGE